In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1660

TERRELL DON HUTTO, Sub Nom. JAMES MABRY, Commissioner, Arkansas Department of Correction; MARSHALL N. RUSH, Chairman, Arkansas Board of Correction; EULA DORSEY, Vice-Chairman, Arkansas Board of Correction; THOMAS H. WORTHAM, M.D., Secretary, Arkansas Board of Correction; RICHARD E. GRIFFIN, Member, Arkansas Board of Correction; and JOHN ELROD, Member, Arkansas Board of Correction,
Petitioners,

vs.

ROBERT FINNEY, et al., *Respondents.*

BRIEF OF THE STATE OF CALIFORNIA, AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The State of California employs over 130,000 persons and, under state law, defends any employee or former employee against any claim or action arising out of an act or omission occurring within the scope of his employment. Calif. Govt. Code § 825, *et seq.* Imposition of attorneys' fees, even in a small percentage of cases, will have a direct and significant impact on the funds and fiscal management of the State of California.

SUMMARY OF ARGUMENT

The Eleventh Amendment to the United States Constitution bars the recovery of attorneys' fees from a state treasury. Those circuits which have held otherwise have misconstrued this Court's opinion in *Edelman v. Jordan,* 415 U.S. 651 (1974). This conclusion cannot be altered by labeling an award of attorneys' fees against the state an "equitable remedy" or a "taxation of costs."

An award of attorneys' fees against state officials cannot be predicated upon the bad faith exception to the American rule prohibiting the award of attorneys' fees, since the state is the real party in interest and since any award of attorneys' fees would have a direct impact on the state treasury.

The Civil Rights Attorneys' Fees Awards Act of 1976 does not abrogate a state's Eleventh Amendment immunity and any attempt by Congress to do so would exceed the permissible scope of section 5 of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I

RECOVERY OF ATTORNEYS' FEES FROM THE STATE IS BARRED BY THE ELEVENTH AMENDMENT.

The Eleventh Amendment to the United States Constitution, ratified in 1798, and unchanged since, provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."

This Court has consistently held that an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state. *Edelman v. Jordan* (1974) 415 U.S. 651, 662-663. In the instant case, although the State of Arkansas was not named a defendant, the lower court ordered the Arkansas Department of Corrections, a state agency, to pay $20,000.00 in attorneys' fees. Such an order has a direct impact on the funds and fiscal management of the State of Arkansas.

In *Edelman*, this Court held that retroactive payment of welfare benefits wrongfully withheld by state officials was barred by the Eleventh Amendment. *Id.* at 662-669. In so holding, this Court stated:

> "'[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' Thus, the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." (Citations omitted). *Id.* at 663.

In so ruling, this Court specifically distinguished *Ex parte Young* (1908) 209 U.S. 123:

> "But the relief award in *Ex parte Young* was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct

of that office to the requirement of the Fourteenth Amendment. Such relief is analogous to that awarded by the District Court in the prospective portion of its order under review in this case.

"But the retroactive portion of the District Court's order here, which requires the payment of a very substantial amount of money which that court held should have been paid, but was not, stands on quite different footing. These funds will obviously not be paid out of the pocket of petitioner Edelman." *Id.* at 664.

This Court also held that labeling an award "equitable restitution" does not evade the Eleventh Amendment bar. *Id.* at 665-666. Further, it was held that the State of Illinois did not waive its Eleventh Amendment protection or consent to be sued because it had participated in a federal AABD program. *Id.* at 671-677.

Amicus submits that the rationale of *Edelman* applies to respondents' request for attorneys' fees. There is no doubt, as in *Edelman,* that the award of attorney's fees has a direct impact upon the funds and fiscal management of the State of Arkansas. Significantly, this Court has summarily affirmed a decision of a three-judge district court in the First Circuit which denied an award of attorneys' fees both as a matter of law and discretion. *Murgia v. Commonwealth of Mass. Bd. of Retirement* (D.Mass. 1974), 386 F.Supp. 179, *judgment affirmed,* 421 U.S. 972.

Amicus recognizes that some circuits have taken the position that an award of attorneys' fees is permissible, on the grounds that such an award has only an "ancillary effect on the state treasury" resulting from compliance with the order of injunctive relief. E.g., *Jordan v. Fusari* (2nd Cir. 1974) 496 F.2d 646. However, an analysis of *Edelman* does not support the conclusion of these circuits. This Court in *Edelman* did not leave at large what was meant by the phrase "ancillary effect." The phrase comes at the end of a paragraph at 415 U.S. 667-668 in which this Court discusses *Ex parte Young* (1908) 209 U.S. 123, as well as two of this Court's more recent welfare cases, and notes that the decrees in those cases would have an effect on the states' funds. "But," this Court stated, "the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees by which by their terms were prospective in nature." 415 U.S. at 667-668. This is the "ancillary effect" that this Court describes as permissible.

In the next paragraph, this Court distinguished the decree it was reviewing from those it had referred to:

"It requires payment of state funds, not as a necessary consequence of compliance in the future with the substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard." 415 U.S. at 668.

It can hardly be argued that an award of attorneys' fees can be classified as a "necessary consequence of

compliance in the future with a substantive federal-question determination. . . ."

The argument has also been made that since an award of attorneys' fees resembles more closely the incidental costs sanctioned by this Court in *Fairmont Creamery Co. v. Minnesota* (1927) 275 U.S. 70 such an award is permitted by the Eleventh Amendment. See *Fitzpatrick v. Bitzer* (1976) 427 U.S. 445, 460 (concurring opinion of Stevens, J.). This argument must fail, for several reasons. First, an award of attorneys' fees has been regarded by this Court as quite unlike an award of taxable costs. *Sprague v. Ticonic Bank* (1939) 307 U.S. 161. This distinction has been followed by circuit courts. See, e.g., *Swanson v. American Consumer Industries, Inc.* (7th Cir. 1975) 515 F.2d 555, 559-560. Secondly, while it is quite true that in *Fairmont,* supra, this Court held that costs could be taxed against Minnesota, it is noteworthy that in that case there is no mention of the Eleventh Amendment. *Fairmont* involved review of a state court decision affirming a criminal conviction. The Eleventh Amendment was not discussed because it had no possible application. The amendment speaks only to suits "commenced or prosecuted *against* one of the United States. . . ." It does not reach a prosecution commenced by the state itself. A state cannot insulate itself from review of its criminal convictions, when they are attacked on federal constitutional grounds, by arguing that under the Eleventh Amendment this Court has no jurisdiction. This much has been settled since the landmark case of *Cohens v.*

Virginia (1921) 6 Wheat. (19 U.S.) 264. Unlike *Fairmont Creamery,* the *civil* suit in the instant case was commenced *against* Arkansas. *Fairmont Creamery* has no application to suits commenced *against* a state.

In any event, any argument that *Fairmont Creamery* supports the imposition of attorneys' fees against the state has been put to rest by this Court in *Edelman v. Jordan, supra.* Labeling attorneys' fees as "costs" is as much an invasion of the Eleventh Amendment as labeling retroactive damages "equitable restitution." *Edelman, supra,* at 665-666.

II

AN AWARD OF ATTORNEYS' FEES AGAINST A STATE MAY NOT BE PREDICATED UPON THE BAD FAITH EXCEPTION TO THE AMERICAN RULE PROHIBITING AN AWARD OF ATTORNEYS' FEES.

In *Alyeska Pipe Line Service Company v. Wilderness Society* (1975) 421 U.S. 240, this Court disapproved the "private attorney general" approach as a basis for court-awarded attorneys' fees in public interest litigation unless authorized by statute. However, *dicta* in the *Alyeska* opinion appears to recognize the continuing validity of the "bad faith" exception to the traditional American rule limiting an award of attorneys' fees (*Id.* at 257-259) and the Eighth Circuit also stated in *dicta* that the bad faith exception applied in this case. Amicus submits that the bad faith exception has no application in the instant case.

This issue was not discussed in *Alyeska, supra,* as the Court of Appeals deemed it inappropriate to burden the State of Alaska with any part of the award. 421 U.S. at 246. Amicus submits that the Eleventh Amendment bars an award of attorneys' fees when relief is sought against a state official. In such a case, the purpose of the action is to remedy a state practice, not to impose a monetary liability against the state for past deprivations of constitutional rights. A state official has both the right and the duty to follow state law. When a constitutional right is alleged to have been violated and a federal suit is filed, the official, as an officer of the state, defends the state interest and, as an officer of the state, will, if ordered, comply with the court order. In such a case the state is the real party in interest. The official is merely a nominal party.[1] To award attorneys' fees on a bad faith theory is tantamount to an award of attorneys' fees against the state and is therefore barred by the Eleventh Amendment. Granting attorneys' fees in an injunctive suit against a state official by labeling the conduct "bad faith" is as much an evasion of the Eleventh Amendment bar as labeling a retroactive monetary award against a state "equitable restitution." In both cases the real party in interest, the state, is being ordered by a federal court to hand over state funds to a private party. In both cases, the Eleventh Amendment, as explained in *Edelman,* prohibits such an award.

[1]This fact is recognized in Rule 25(d) of the Federal Rules of Civil Procedure, which allows substitution of officials in suits seeking injunctive relief.

This is not to say that an individual state official cannot be held personally responsible for a direct and knowing contempt of a federal court order, or that an individual state official cannot be personally liable for damages in a proper suit in which the plaintiff overcomes the official's qualified executive immunity. See *Schuerer v. Rhodes* (1973) 416 U.S. 232, 238. However, amicus submits that in a contempt proceeding or a damage suit, unlike his position in a suit seeking injunctive relief, the state official is himself the real party in interest.

Redress for the personal acts of state officials during the pendency of an injunctive suit may not be had under the guise of an award of attorneys' fees. Such redress must be sought only in contempt proceedings or a damage action.

III

THE CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT OF 1976 DOES NOT ABROGATE A STATE'S ELEVENTH AMENDMENT IMMUNITY AND ANY ATTEMPT BY CONGRESS TO DO SO WOULD EXCEED THE PERMISSIBLE SCOPE OF SECTION FIVE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. The Civil Rights Attorneys' Fees Awards Act of 1976 does not abrogate a state's Eleventh Amendment immunity.

In ordering the award of attorneys' fees in this case, the Eighth Circuit relied upon the Civil Rights Attorneys' Fees Award Act of 1976, Public Law No. 94-559, 90 Stat. 2640 (Oct. 19, 1976) (hereinafter "The Act") which states, *inter alia:*

> "In any action or proceeding to enforce a provision of sections . . . 1979 [42 U.S.C. § 1983] . . . of the Revised Statutes, . . . the Court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorneys' fee as part of the cost."

Amicus submits that this Act cannot be interpreted to apply to a state. The settled and unassailable interpretation of section 1983 is that neither a state nor any of its agencies is a "person" within the meaning of that provision. *Edelman v. Jordan* (1974) 415 U.S. 651; *United States ex rel. Gittlemacker v. Comm. of Pa.* (E.D. Pa. 1968) 281 F.Supp. 175, *aff'd* (3rd Cir. 1969) 413 F.2d 84, *cert. denied* (1970) 396 U.S. 1046. In providing for an award of attorneys' fees in certain civil rights actions by its adoption of the Act, Congress did not change the definition of "person" against whom an action may be brought. Consequently, Arkansas is still immune under the Eleventh Amendment from an award of attorneys' fees against it, notwithstanding the indications to the contrary in the legislative history accompanying the Act.

The Report of the House of Representatives Committee on the Judiciary, H.R. Rep. No. 94-1588, 94th Congress, 2nd Session, September 15, 1976 (to accompany H.R. 15460), at 7, concluded that governmental officials, who frequently are defendants in civil rights actions

> ". . . have substantial resources available to them through funds in the common treasury, including taxes paid by the plaintiff themselves. . . . The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities."

Without any extended analysis, the Judiciary Committee simply relied upon this Court's decision in *Fitzpatrick v. Bitzer, supra,* 427 U.S. 445, in concluding: "Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state government." House Report, at 7, n. 14. It is submitted that the Judiciary Committee misinterpreted the impact of the Court's decision upon Congress' power to abrogate the Eleventh Amendment.

In *Fitzpatrick,* this Court authorized the award of back pay in the form of past retirement benefits as money damages in a suit brought against the State of Connecticut pursuant to Title VII of the Civil Rights Acts of 1964. However, Title VII had been expressly amended to subject governments, government agencies and political subdivisions to suit for violations of Title VII. The Court distinguished its prior decision in *Edelman v. Jordan, supra,* in which a retroactive award of damages had been denied, because Title 42, United States Code section 1983 does not contain any Congressional authorization to join a state as defendant. The existence of such authorization under Title VII, exercised pursuant to Congress' authority under section 5 of the Fourteenth Amendment, was held by the Court to overcome the Eleventh Amendment defense asserted by the state in *Fitzpatrick.* As stated by this Court:

> "We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." 427 U.S. at 456.

Unlike the legislation in issue in *Fitzpatrick,* in the instant case, Congress did *not* subject the states to awards of damages and attorneys' fees in actions brought under Title 42, United States Code section 1983. Rather, Congress merely rendered those "persons" already subject to suit under the Civil Rights Act provisions specified therein as subject to an award of attorneys' fees as well. Consequently, unlike a Title VII suit, there is no "threshold . . . congressional authorization" which allows a section 1983 suit to be brought against a state. 427 U.S. at 452.

The Report of the Senate Judiciary Committee, No. 94-1011, June 29, 1976 (to accompany section 2228) exhibits a similar misconception as to the constitutional scope of the Act. As did the House Report, the Senate Report concluded that attorneys' fees "will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the state or local government (whether or not the agency or government is a named party)." Senate Report, at 5. Since the Senate Report was issued prior to this Court's decision in *Fitzpatrick v. Bitzer, supra,* the Senate Judicial Committee couched its rationale in terms apparently adopted from *Edelman v. Jordan, supra,* justifying the fee

awards as "ancillary and incident to securing compliance with these laws" and "an integral part of the remedies necessary to obtain such compliance." Senate Report at 5. For the reasons noted, *supra,* pp. 4-6, the Senate Judiciary Committee's reliance on the "ancillary" language in *Edelman* is misplaced.

Whatever its intent, Congress has not, by the express language of the Act, subjected states to liability for attorneys' fees. As stated by the United States District Court, Middle District of Pennsylvania, in dealing with this issue: "In the absence of explicit statutory language subjecting the states to liability for damages and attorneys' fees, this Court will not imply a limit to the state's immunity under the Eleventh Amendment." *Skehan v. Bd. of Trustees of Bloomsburg State* (M.D. Pa. 1977) 436 F.Supp. 657, 667.

B. Any Congressional attempt to abrogate the immunity of the Eleventh Amendment and subject the states to the payment of attorneys' fees exceeds the permissible scope of the Fourteenth Amendment to the United States Constitution.

Section 5 of the Fourteenth Amendment states: "The Congress shall have the power to enforce, *by appropriate legislation,* the provisions of this article." (Emphasis added.)

Amicus submits that any legislation that imposes on a state the burden of financing a prison suit is not "appropriate legislation."

In our federalist system, "there is a sensitivity to the legitimate interests of both State and National

Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in a way that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris* (1971) 401 U.S. 37, 44. No state interest requires more protection from undue Congressional interference than a state's law enforcement system. If Section 5 of the Fourteenth Amendment grants Congress such unbridled and non-reviewable power, a state's right to administer its criminal justice system have been greatly eroded, and the existence of federalism will depend solely upon Congressional majority rule.

This is especially the case in section 1983 suits, in which state officials are already subject to suits seeking injunctive relief and money damages. The added cost of attorneys' fees, which in many cases may result in a greater financial burden on a state than the expense of compliance with a court order, imposes an unreasonable chilling effect on a state's right to defend against civil rights actions.

Moreover, there is no practical protection afforded a state against suits of harassment. Even if a state could meet the more rigid standard imposed by the Act and prove an action is vexatious or frivolous or was instituted *solely* to harass or embarrass (Assembly Report at 6-7), the plaintiff in such action is generally judgment proof. Consequently, a plaintiff in a prison case generally has nothing to lose by initiating an action, however groundless. The state, on the other

hand, constantly runs the risk of substantial monetary losses each time an official is sued.

To the extent that *Fitzpatrick v. Bitzer, supra,* sanctions such wholesale intrusions into state treasuries, amicus suggests that this Court reevaluate its position, reaffirm our federalist system, and hold that the Fourteenth Amendment does not give Congress the power to overrule the Eleventh Amendment and authorize the imposition of monetary claims against states.

CONCLUSION

For the foregoing reasons, amicus respectfully request that the judgment of the Court of Appeals awarding attorneys' fees be reversed.

Dated, November 30, 1977.

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